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No. 94-334

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CHRISTINE WILLIAMS and CITIZENS FOR LIFE,
Petitioners,

v.

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

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REPLY BRIEF FOR PETITIONERS

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ARGUMENT

The decision of the Supreme Court of California plainly requires reversal, or vacation and remand, in light of this Court's intervening decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). *Accord Reali v. Feminist Women's Health Center*, 114 S. Ct. 2776 (1994) (summarily granting review, vacating decision below, and remanding for further consideration in light of *Madsen*);[1] *Lawson v. Murray*, 63 U.S.L.W. 3256 (U.S. Oct. 3,

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[1] *Reali* involved an injunction imposing a smaller "speech-free zone" than the one upheld in the present case. *See Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543, 22 Cal. Rptr. 2d 184 (1993) (zone extending 20 feet on each side of front entrance), *vacated*, 114 S. Ct. 2526 (1994). Accordingly, the need to vacate the judgment in the present case is even more compelling.

1994) (No. 94-45) (same). The decision below also conflicts with a decision of the Second Circuit issued subsequent to the filing of the petition for certiorari in this case. *See Pro-Choice Network of Western New York v. Project Rescue Western New York,* Nos. 92-7302, 93-7918 (2d Cir. Sept. 6, 1994) (1994 WL 480642) (overturning, as unconstitutional, injunctive creation of 15-foot "bubble zones" outside abortion businesses). This Court should therefore grant the present petition.

1. Conflict with *Madsen*

In this case the state supreme court upheld an injunction forbidding all "picketing, demonstrating or counseling" on the public sidewalk adjacent to respondent's abortion facility. Applying the "time, place, and manner" test, Pet. App. 6a-7a, and declaring that "the critical issue was not access," *id.* at 21a n.10, the court upheld the injunction as narrowly tailored to "mitigate the emotional impact" of petitioner's expressive activities on respondent's clientele, *id.* at 20a. In *Madsen*, by contrast, this Court *rejected* the use of the "time, place, and manner test" for injunctions, 114 S. Ct. at 2525, *rejected* restrictions on even "insulting" and "outrageous" speech, *id.* at 2529, and *rejected* a "buffer zone" insofar as that zone was not "necessary to protect *access* to the clinic," *id.* at 2528 (emphasis added).

In short, the decision below is thoroughly irreconcilable with this Court's decision in *Madsen*.

Respondent Planned Parenthood Shasta-Diablo, Inc. (PP) cannot seriously dispute this conflict with *Madsen*. PP admits that the court below used "a less stringent standard than the one adopted in *Madsen,*" Opp. at 8 (heading), concedes that "patients may not have been physically barred from entering or leaving," *id.* at 12, and acknowledges that the decision below rests upon a concern with avoiding the *potential* effects of the "emotional impact" of encounters between PP's patrons and "even

a limited number of pickets and sidewalk counselors," *id.* at 18; *see also id.* at 14-15.

PP tries to defend the decision below by arguing that the decision would not justify "excluding *all* anti-abortion speech from *all* public sidewalks or property adjacent to abortion clinics," Opp. at 1 (editing marks and citation omitted). Yet PP fully embraces the reasoning of the court below that "the very presence and proximity of the picketers" and counselors, *id.* at 17 n.5, even in limited numbers, *id.* at 18, posed an "intolerable threat to the emotional health and safety of the patients," *id.* at 18-19 (quoting court below). Obviously, this faulty reasoning—equating mere "presence" with an "intolerable threat" to "emotional health"—would support a total ban on all pro-life speech outside abortion businesses.

PP, like the court below, would uphold the "preclusion of face-to-face, physical confrontations with the protesters," Opp. at 19 (quoting court below). In essence, both PP and the court below assert that speech limits must yield, not just to the preservation of "unfettered access," *Madsen*, 114 S. Ct. at 2527, but to the maintenance of *emotionally sheltered* access, *see, e.g.*, Pet. App. 10a (court below describing injunction as "effectively insulating the clinic's patients and staff" from contact with petitioners).

This logic is anathema both to the *Madsen* decision in particular and to First Amendment jurisprudence in general. Many traditional forms of free speech involve "face-to-face, physical confrontations"—i.e., personal contact. *E.g., Meyer v. Grant*, 486 U.S. 414, 424 (1988) (circulating petitions; "the most effective, fundamental, and perhaps economical avenue of political discourse [is] direct one-on-one communication"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (accosting strangers and challenging their religious beliefs); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (stationing "store watchers" outside boycotted businesses); *Thornhill v.*

Alabama, 310 U.S. 88 (1940) (picketing outside business); *Lovell v. Griffin*, 303 U.S. 444 (1938) (leafletting). Indeed, in the precise context of abortion protest, this Court affirmed the fundamental axiom of free speech that, "[a]s a general matter, . . . in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Madsen*, 114 S. Ct. at 2529 (internal quotation marks and citation omitted).

PP tries to defend the decision below on the basis of supposedly "unique circumstances." Opp. at 18 (quoting court below). But the "unique" feature of this case consists not of the *facts*—typical picketing and leafletting [2] on a typical sidewalk [3]—but rather the *legal* holding that suppressed expressive activities even where "the critical issue was not access," Pet. App. 21a n.10.

2. Conflict with the Second Circuit

The decision below also conflicts sharply with the very recent, post-*Madsen* decision of the Second Circuit in *Pro-Choice Network of Western New York v. Project Rescue Western New York*, Nos. 92-7302, 93-7918 (2d

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[2] PP repeats the misleading claim that the number of protesters varied from a handful to "over 100." Opp. at 3, 9; *id.* at 4. As petitioners have already explained, the usual number of pro-life individuals present was about eight; only on one occasion—on a weekend, when no abortions were scheduled—were there almost one hundred people present. Pet. at 3 n.1. PP does not dispute this fact.

[3] PP describes the sidewalks as "very narrow" because "even a few protesters could easily impede" passage. Opp. at 18. But the appellate court described the sidewalk as appearing to be "four to six feet wide," Pet. App. 55a n.3—not an unusually small dimension. Furthermore, the claim that "even a few protesters" *could* block a sidewalk would be true of all but the most spacious sidewalk promenades. The First Amendment is not limited to such exceptional locales.

Cir. Sept. 6, 1974) (1994 WL 480642) (hereinafter *P.C. Network*).

In *P.C. Network*, the Second Circuit struck down as unconstitutional a speech-free "bubble zone" extending fifteen feet from the entrances and driveways of an abortion business. Applying "the *Madsen* test," slip op. at 20, the court of appeals noted that the 15-foot zone "apparently forbids conduct even beyond that which would obstruct or impede access. For example, . . . the injunction . . . prohibits a defendant from standing on a sidewalk in front of the clinic, within fifteen feet of the entrance, holding a sign imprinted with an antiabortion message." *Id.* at 22. Moreover, "the need for this prohibition . . . is not established on this record," *id.* (The record included some six findings of contempt for violating a previous injunction. *Id.* at 22-23.) In contrast with *Madsen*, the court explained, there was "no indication that the . . . violations were so pervasive as to undermine the . . . general goal of ensuring access to abortion facilities." *Id.* at 23-24. The Second Circuit concluded that "unless and until the record supports a finding that the prohibition against obstructing or impeding access to the facilities is ineffective to protect access, the bubble zone provision does not pass constitutional muster." *Id.* at 24.

In the present case, the Supreme Court of California did not even pretend that the injunction was necessary to ensure access. Instead, the court approved the injunction as a means for emotionally insulating PP's clientele. "[M]erely keeping the sidewalks free for passage does not address the problem of protesters hounding and upsetting unwilling listeners." Pet. App. 20a. But as the Second Circuit observed, this rationale is constitutionally suspect: "an injunction's purpose of avoiding stress to prospective clinic patients . . . might constitute a justification that impermissibly refers to content." *P.C. Network*, slip op. at 19. *Accord Madsen*, 114 S. Ct. at 2529 (noting that an intent "to reduce the level of anxiety and hypertension suffered by the patients," by prohibiting "images observ-

able" to the patients, could only plausibly rest on the rationale that patients "found the expression contained in such images disagreeable").

The decision below, upholding an injunction that was admittedly not necessary to ensure access, plainly could not survive review in the Second Circuit.

CONCLUSION

The First Amendment does not countenance the prohibition of speech in the name of preventing emotional upset. As this Court has observed, "if absolute assurance of tranquility is required, we may as well forget about free speech." *City of Houston v. Hill,* 483 U.S. 451, 462 n.11 (1987) (editing marks and citation omitted).

The decision below, issued prior to *Madsen,* cannot survive *Madsen.* Furthermore, the decision below conflicts with a post-*Madsen* decision of the Second Circuit. This Court should grant this petition and either summarily reverse the decision below or vacate that decision and remand for further consideration in light of *Madsen.* In the alternative, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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